INTERNATIONAL ARBITRATION [1]

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THE subject on which I am to speak is by no means new. For that reason I suppose it ought to be regarded as very uninteresting.

I may at once say that I am not acquainted with, and hardly feel capable of formulating, any special device which will certainly assure the preservation of peace among nations.

There are certain methods of settling international disputes, which are known as amicable methods, as distinguished from inamicable and forcible methods. The amicable methods are negotiation, mediation and good offices, which I mention together, and arbitration.

Negotiation is simply the ordinary method of diplomacy.

Mediation stands midway between negotiation and arbitration, and in connection with it I mentioned good offices. We speak of good offices where some third power or powers come between disputants, listen to their complaints, and make suggestions and tender advice.

Mediation is the formal exercise of good offices. Sometimes a tribunal is organized which proceeds with much formality, but, whatever the procedure may be, mediation results in a recommendation which the parties to the dispute are at liberty to reject.

The third method, that of arbitration, represents the judicial process of settling international disputes. When I say the judicial process, I am not at all unconscious of the fact that we hear a great deal in these days of the "judicial settlement" of international disputes, as if it were something entirely novel. It is said that heretofore we have had arbitration,

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but that arbitration has failed, and that now we are to have the "judicial settlement" of international disputes.

Such statements illustrate the propensity to accept phrases rather than to search for facts. I fancy that the number of those who have had occasion actually to read the decisions of international boards of arbitration is small. There may indeed be members of the bar who read the decisions of judges for mere pleasure. But, after all, I fancy that we do most of our reading of judicial opinions professionally, more or less under the stress of professional necessity.

Now, it has fallen to my lot, in the pursuit of my professional work, to have read practically all the decisions that have ever been rendered by international tribunals, and there are some thousands of them. In fact, I was once so unkind, perhaps I might almost say so cruel, as to inflict them upon my fellow-men by incorporating them in some six large volumes, which should have been printed in twelve instead of six, because the present volumes are too large for the reader's convenience. When, therefore, I venture, very diffidently, to make a statement in regard to the proceedings of international tribunals, I feel that I know the ground on which I stand; and I venture to assert that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that preceded it, as you will find in the proceedings of our ordinary judicial tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the "judicial settlement" of international disputes we are presenting some new device or new method.

I have said that a tribunal of arbitration decides. Its proceedings result in the rendering of a judgment which is binding upon the contracting parties. It therefore can be employed where, in many cases, mediation would be ineffective. On the other hand, mediation may be employed in cases which the disputants would be unwilling to submit to a definitive

judgment. If I had the time in which to do it, I could point out numerous instances in which the judgments of tribunals of arbitration have been accepted by the parties and loyally carried out, although they imposed terms which it is inconceivable that the parties would have accepted upon the mere recommendation of a board of mediators. In other words, if there had been any loophole of escape, the parties would have availed themselves of it, but having agreed to submit the matter to judgment, and to abide by the award, they have done so, loyally and completely.

There is another misconception that I should be glad to correct, and that is that there has been great uncertainty in the enforcement of the judgments of tribunals of arbitration. Again I venture to affirm, upon the basis of actual information, that the awards of international boards of arbitration have been very generally accepted and carried into effect. I do not think I am mistaken when I say that if there has been a tendency during the last few years to question the accuracy and the binding effect of such awards, it has been due chiefly to the unfortunate supposition that no judgment should ever be regarded as final till it has been the subject of review on appeal. Lawyers are too much in the habit of thinking of judicial process as a series of appeals, till they finally get up to a tribunal beyond which nothing can be imagined. But, I venture to repeat that the cases have been few, very few indeed, in which the awards of international tribunals have not been accepted and loyally carried out.

I have said that international arbitration is not a new thing; and I will now go a step further and affirm that the judicial process which it has exemplified is one of which we must avail ourselves in dealing with all human affairs. Within the state it is inconceivable that we should be able to get on for a week or even for a day, with any approach to a condition of tranquillity, if we were to abolish the judicial process. We use negotiation, and we use mediation, all the while, in our private affairs as well as in our public affairs, but cases daily arise in which it is necessary to obtain an authoritative decision, and then we invoke the judicial process. We may therefore

accept it as absolutely certain, that, no matter what kind of a league, or alliance, or other contrivance may be set up in international affairs, we shall be obliged to invoke the process of arbitration, in the judicial sense.

Several years ago a scholar named Raeder published, under the auspices of the Nobel Institute, a very interesting work entitled *International Arbitration among the Greeks*. I have very often seen the statement that, while the Greeks practised what they called arbitration, it was not real arbitration, but something else. But, as a matter of fact, the Greeks had as clear, as intelligent, as precise a conception of the process of international arbitration, in the judicial sense, as exists today, as may be seen by an actual examination of the awards rendered by the tribunals employed by them for the determination of disputes between the different states.

Later, when the Roman Empire came into existence, with its conceptions of conquest and domination, there was little room for international arbitration; but, after the decline and fall of the Empire, the states that succeeded it employed the process on an extensive scale, especially under the influence of the Church. As a result, however, of the wars, somewhat miscalled "religious," of the sixteenth and seventeenth centuries—I say somewhat miscalled religious, because questions of property, politics and dominion were decidedly interwoven with questions of faith—international arbitration, being an amicable process, practically disappeared.

During the eighteenth century thoughts of arbitration began to revive; and, after the close of the Napoleonic Wars, when the world was worn out with fighting, nations not only talked a great deal about arbitration, but actually employed it on a very large scale, by the adoption of general claims conventions for the settlement of all outstanding questions. Under these conventions or treaties—the words being here interchangeable—all disputes that had arisen since a certain date were submitted, without exception, to the decision of arbitrators.

During the hundred years that followed the formation of the Constitution, the United States made numerous treaties of that kind; and I should say that the high-water mark of inter-

national arbitration, that is, of its actual application, was reached in the case of the award on the "Alabama" claims by the tribunal at Geneva in 1872. This was so, not only because of the nature and magnitude of the questions submitted, but also because, when the United States first proposed arbitration, the British government declined it, on the ground that the questions at issue involved the "honor" of Her Majesty's Government, of which, speaking in the approved phrase, it was declared that Her Majesty's Government was "the sole guardian." Of course every man and every nation is the "sole guardian" of his or its own "honor"—whatever that may be.

But, after thinking the matter over for six or eight years, eminent British statesmen came to the conclusion that perhaps a basis might be found on which this very grave dispute might be submitted to impartial and learned men, wise men, for judicial decision; and in the end there was made the great Treaty of Washington of May 8, 1871, by which it was provided that the claims generically known as the Alabama claims should be submitted to an arbitral tribunal, which was to sit at Geneva. As I look on my right, I have great pleasure in recognizing an eminent diplomatist, who is also a friend, whose government, that of Brazil, was called upon to appoint one of the five members of that exalted tribunal.

The proceedings resulted in the award of $15,500,000 to the United States. This is one of the cases I had in mind when I said that arbitration might be used to obtain a settlement which mediation could not effect. For, if the tribunal had been one of mediation, and its members, being thus limited to the exercise of advisory powers, had only recommended the payment of the sum above mentioned, we may believe that the recommendation would have been rejected. We had not then entered the period of "trust" organization, when such sums seem trivial. On the contrary, the draft for the payment of the award was the largest that had ever been drawn, and it is hardly conceivable that, with the feeling then existing over some of the questions covered by the award, a mediatorial recommendation of the payment of $15,500,000 would have been entertained for a moment.

After the close of the sessions of the Geneva Tribunal, there sprang up a world-wide agitation for the establishment of some general method by which disputes between nations might be referred to arbitration. The success of the Tribunal in peacefully disposing of differences of the gravest character between two great nations caused peoples to feel a certain confidence in the process; and the agitation to which the Geneva Arbitration gave rise may fairly be regarded as having directly contributed to the adoption of the Hague Convention of 1899, establishing what is called the Permanent Court at The Hague.

Great things were hoped for from the establishment of that court. But it was followed by a movement which was so conducted that its results were, as I am compelled to believe, altogether unfortunate. The Hague Convention of 1899, while it did not make arbitration obligatory upon the contracting parties, excepted nothing from the process. Consequently, it did not suggest to the contracting parties pretexts for avoiding arbitration if they should be disinclined to adopt it. It is related of a certain general, who pointed out to his troops a way by which they might escape, that, when the enemy appeared, they promptly took it. The Hague Convention of 1899 did not obstruct the highway with signposts pointing to avenues of escape, even if it did not profess to compel the traveler to follow the main road. But, there were those who thought we must have something in form obligatory, and in the end what they did was this: They made a so-called obligatory treaty which was very widely adopted afterward, because nobody could see any reason for not adopting it, especially if he did not want to arbitrate; a treaty by which it was provided that questions of a "judicial order," or relating to the interpretation of treaties, should be submitted to arbitration, provided they did not affect the "vital interests," the "independence," or the "honor" of the contracting powers, or "concern the interests of third powers."

Evidently, the substance of this treaty or convention is in the exceptions. Just what the fancied obligation embraces I have never been able to detect, even after a somewhat microscopic examination. Remember, the sweeping provisos above quoted

are limitations not upon the general obligation to arbitrate; they are limitations upon the agreement to submit only questions of a "judicial order;" and they then proceed to declare that even as to questions of a judicial order arbitration may properly be excluded. What, then, have we left?

Nor is this all. If we are to make any progress in the world, we must set up some sort of standard or ideal. Perhaps we may say that after all there are such things as general principles to which it is important to adhere, because, if we abandon them, we are left without any means of reckoning, and are reduced to a mere shifty opportunism. The Hague Convention of 1899, although not in terms obligatory, did not in effect declare that the contracting parties need not arbitrate any question which they regarded as serious or important. The so-called "obligatory" treaties, in expressly authorizing and justifying the contracting parties in excluding any question which they might be inclined, on grounds of interest or of feeling, to exclude, even though it should be of a "judicial order," discredited international arbitration as a practical measure and placed it among unreal things, which only visionaries would pursue. This lowering of the standards was not warranted by the facts.

I have but one more word to say. In discussing and estimating methods or devices, whether arbitral or otherwise, for the peaceful settlement of international disputes, we must never lose sight of human nature. There exists on the part of men in masses a tendency to endeavor to attain their ends by violence. We observe this tendency all through human history; and, bearing it in mind, and remembering that human dispositions change very slowly, we must watch our own thoughts and inclinations as well as those of other people. That great interpreter of the human heart, Robert Burns, admonishes us to keep an eye on our own defects, lest we become "o'er proud." Each people thinks itself not only peaceful, but much more peaceful than any other people. It is a matter of common knowledge that no nation in its own estimation ever wants to fight; it is always some other nation, perhaps even a very small and helpless one, that wants to go to war. The United

States, we are constantly told, has always longed to arbitrate everything; and this, in spite of the fact that George Bancroft supposed he was stating the truth, when, in opening the case of the United States in the arbitration of the San Juan Water Boundary, he said: "Six times the United States had received the offer of arbitration on their northwestern boundary, and six times had refused to refer a point where the importance was so great and the right so clear." And when at last the question was submitted to the German Emperor as arbitrator, we insisted upon and obtained a restricted submission, such as we had previously endeavored to secure. I mention this incident merely as an illustration of the truth of the poet's admonition, that, lest we become unduly self-satisfied, we should keep an eye upon ourselves as well as upon other people.